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Tort Claims Act -- Distinction between Nonfeasance and Misfeasance

Jesse M. Henley Jr.

CONCLUSION

In spite of frequent statements to the contrary,[39] the doctrine of recoupment in federal taxation still lives, as evidenced by the many recent cases which employ it to effect an equitable result seemingly otherwise unobtainable because of the specific language of the statutes barring the claim. The taxes must arise out of the same transaction and the parties in interest must be the same. The longer the period of time which the transaction covers, the more doubtful is the application of the doctrine by the courts. If fresh claims could be created by act of one of the parties in favor of the other to enable the creator to recoup barred claims, the whole policy of barring claims would be defeated and no equities demand the application of the remedy.[40] Like most other problems in law, questions such as "What constitutes a single taxable event or the same transaction?" and "How long is too long?" may never be finally answered but can only be circumscribed by recurring decisions.

JOEL L. FLEISHMAN

Tort Claims Act—Distinction between Nonfeasance and Misfeasance

In *Flynn v. State Highway Comm'n*,[1] plaintiff's intestate was killed when the truck in which he was a passenger was wrecked as a result of its wheel striking a hole in the road, causing its driver to lose control. In plaintiff's action against the state for negligence in leaving the road in disrepair, the Supreme Court affirmed the lower court, which had affirmed the Industrial Commission, holding that the Tort Claims Act covers only negligent *acts* by state employees and not negligent *omissions*. In reaching this decision the court stated:

> In order to authorize the payment of compensation, the Industrial Commission's finding must include (1) a negligent act, (2) on the part of a state employee, (3) while acting in the scope of his employment, etc. The first requirement is that the claimant show a *negligent act*. Is a failure to repair a hole in the highway caused by ordinary public travel a negligent act? The requirement of the statute is not met by showing negligence, for negligence may consist of an act or an omission. Failure to act is not an act. We think it was the intent of the legislature to permit recovery only for the negligent acts of its employees, for the things done by them, not for the things left undone. If the intent had been otherwise, it would have been easy to permit recovery for the negligent acts *and omissions* of State employees.[2]

[39] Wood v. United States, 213 F.2d 660, 661 (2d Cir. 1954).
[40] St. Louis Union Trust Co. v. Finnegan, 53-1 CCH U.S. TAX CAS. ¶9299 (E.D. Mo. 1953).

[1] 244 N.C. 617, 94 S.E.2d 571 (1956).
[2] *Id.* at 620, 94 S.E.2d at 572.

The provision of the Tort Claims Act that recovery may be had only for a negligent *act*[3] considerably limits the state's tort liability. Negligence is usually defined as the failure to use due care, or to act as a reasonably prudent man would act under the same or similar circumstances.[4] It is generally recognized that negligence may consist of either a negligent act or a negligent omission to act.[5] Indeed, the court in the principal case recognized as much in the language quoted above.

The distinction between acts and omissions seems not to have penetrated the field of municipal liability for torts committed by its agents either in North Carolina or other states. There is accord among the courts as to the rule of liability of municipal corporations.[6] A municipality is generally held liable for failure to maintain its streets, even though maintenance of streets is a governmental and not a proprietary function; liability does not usually attach to negligent performance by a municipality of a governmental function.[7] By statute[8] in North Carolina there is imposed on municipalities the positive duty to maintain streets in a reasonably safe condition for travel, and negligent failure to do so will result in liability for proximate injury.[9] Many of the cases arising against municipalities have concerned negligent omissions[10] rather than negligent acts. If these actions had been brought under the Tort Claims Act there seems no reason to doubt that the plaintiff would have had no chance of recovery.

It is very hard to find fault with the decision in the *Flynn* case. The court has in the past committed itself to a strict construction of

[3] N.C. GEN. STAT. § 143-291 (1952).

[4] Barnes v. Caulbourne, 240 N.C. 721, 83 S.E.2d 898 (1954); Rea v. Simowitz, 225 N.C. 575, 35 S.E.2d 871 (1945); PROSSER, TORTS § 31 (2d ed. 1955).

[5] "If the defendant enters upon an affirmative course of conduct affecting the interest of another, he is regarded as assuming a duty to act, and, will therefore be liable for negligent acts or *omissions*." (Emphasis added.) PROSSER, TORTS § 38c (2d ed. 1955). Mikeal v. Pendleton, 237 N.C. 690, 75 S.E.2d 756 (1953); Diamond v. McDonald Service Stores, 211 N.C. 632, 191 S.E. 358 (1937); Hamilton v. Southern Ry., 200 N.C. 543, 158 S.E. 75 (1931).

[6] "Apart from statute late decisions in a majority of the states affirm implied municipal liability to private actions for injuries resulting from defective public ways. In other words, the right to recover against a city for actionable negligence for defects in its streets and sidewalks is based on the common law, and requires no statute to proclaim it." 7 McQUILLIN, MUNICIPAL CORPORATIONS § 2901 (rev. ed. 1945).

[7] Glenn v. Raleigh, 246 N.C. 469, 479, 98 S.E.2d 913, 920 (1957) (concurring opinion); Note, 36 N.C.L. REV. 97 (1957).

[8] N.C. GEN. STAT. § 160-54 (1952).

[9] Hunt v. High Point, 226 N.C. 74, 36 S.E.2d 694 (1946); Millar v. Wilson, 222 N.C. 340, 23 S.E.2d 42 (1942); Bunch v. Edenton, 90 N.C. 431 (1884).

[10] Hunt v. High Point, 226 N.C. 74, 36 S.E.2d 694 (1946) (failure to provide handrail and to furnish adequate lighting); Beaver v. China Grove, 222 N.C. 234, 22 S.E.2d 434 (1942) (failure to erect caution signs; manhole cover allowed to protrude); Waters v. Belhaven, 222 N.C. 20, 21 S.E.2d 840 (1942) (wire hoops not removed from street); Love v. Asheville, 210 N.C. 476, 187 S.E. 562 (1936) (failure to clear ice from bridge).

the act.[11] Our court is not alone in this view,[12] the reason being that a statute creating sovereign liability is in derogation of the common law and grants a right not naturally accorded the citizens of a state.[13]

Argument cannot validly be based on the proposition that the legislature intended the act to include negligent omissions as well as negligent acts. As is pointed out in the *Flynn* case, the legislature amended the Tort Claims Act in March 1955 by inserting the words "or omission" after the words "negligent act."[14] This amendment may indicate that the legislature did not consider them as part of the original act. In May 1955 the act was again amended to strike out the words "or omission" from the amended version.[15] These two amendments indicate the unmistakable intent of the legislature to exclude state liability for negligent omissions, so that the court's interpretation of legislative intent is unimpeachable.

Many fears account for continuation of the principle of governmental immunity. Perhaps the chief one is the fear that the public coffers cannot stand the strain which would be thrust upon them by the institution of many suits demanding damages for torts. Time has shown that this fear is not valid. In allowing recovery for torts all states have found that this expense constitutes but a very minute part of total annual expenditures.[16] This fear coupled with reluctance to depart from a well worn path are, perhaps, why the legislature let caution be its watchword. There is an obvious inequality in allowing the plaintiff injured by a negligent act to recover, while denying recovery to the plaintiff injured as a result of an equally negligent omission to act. It is submitted that the act should be amended so as to make the state liable for the negligence of its employees "in accordance with the same rules of law as applied to action . . . against individuals and corporations."[17] The adoption of this amendment would bring North Carolina in line with the New York and federal view of governmental liability, which is that the government is liable the same as private parties.[18]

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[11] Jenkins v. Department of Motor Vehicles, 244 N.C. 560, 94 S.E.2d 577 (1956), 35 N.C.L. REV. 564 (1957); Floyd v. State Highway Comm'n, 244 N.C. 461, 85 S.E.2d 703 (1955).

[12] Borchard, *Government Liabiilty in Tort,* 34 YALE L.J. 1 (1924).

[13] Borchard, *supra* note 12, at 9.

[14] N.C. Sess. Laws 1955, c. 400.

[15] N.C. Sess. Laws 1955, c. 1361.

[16] Anderson, *Recovery from the United States Under the Federal Tort Claims Act,* 31 MINN. L. REV. 465 (1947).

[17] N.Y. CT. CL. ACT § 8.

[18] 60 STAT. 842 (1946), 28 U.S.C. §§ 2671-2674 (1952); N.Y. CT. CL. ACT § 8. There has been little or no symmetry in the adoption by the states of tort claims acts. Indeed there are few states that have a unified act or group of statutes which might be termed a tort claims act. Many states have constitutional provisions which prohibit the state from being made a defendant in a tort action.